In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

CALDWELL & LYCETTE,
Attorneys for Appellant.

1311 Alaska Building
Seattle, Washington

MARTIN & DICKSON, *Printers*

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This appeal was affected by filing a notice of appeal, assignments of error, bond and citation on appeal, on April 23, 1928, prior to the return to the rules requiring a petition and order allowing appeal.

The appeal involves only questions of law. The testimony is extremely short and undisputed. A written waiver of jury was filed. (Tr. 8.)

The appeal is from a judgment in favor of the United States after a hearing on a contested writ of scire facias on a bail bond.

STATEMENT OF THE CASE
PLEADINGS

Writ of scire facias (Tr. 1-3)—The writ (complaint) alleges that on February 5, 1925, a $750 bail bond was executed by Larry Burns and the National Surety Company, appellant, conditioned for the appearance of Burns in the district court at Seattle, during the *May,* 1925, term, from time to time and term to term thereafter, to answer a charge *exhibited* against him; that thereafter, on September 8, 1925, said Burns being called to answer said charge came not, but defaulted; that on motion of the government it was considered by the court that Burns and the National Surety Company forfeit and pay to the United States $750, according to the tenor of said bond, unless they show cause to the contrary. Then follows the command to appear and show cause why the judgment nisi should not be made absolute.

Return and answer (Tr. 4). The answer denied that the bond was conditioned as alleged; and denies that Burns was called at any proper time; and denies that any default was made. And alleges affirmatively: *First affirmative defense*—no charge was filed against Burns until May 15, 1925, which was three months after the date on which the defendant was bound by said bond to appear, and in the next term of court.

Second affirmative defense (Tr. 6) alleges:

> "That the charge for which said defendant was bound by his said bond to appear was the charge of having 'on or about November 21, having violated the National Prohibition Act', while the charge which was filed against said defendant was the charge of having 'on October 4, October 16, October 24, October 31 and November 8, violated the National Prohibition Act' none of which alleged violations were on or about November 21, as provided for in said bond."

Third affirmative defense (Tr. 6) alleges:

> "That on May 26, 1925, said defendant appeared in said court and plead guilty to two of the counts filed against him, and thereby fulfilled the condition of his said bond."

Reply—no reply was filed.

EVIDENCE

The bill of exceptions (Tr. 15-18)—plaintiff offered the bond, exhibit 1 (Tr. 19), in evidence, and

also offered in evidence a line from the clerk's docket as follows (Tr. 16), "showing that on May 26th the defendant Burns revised his plea to guilty to counts one and two; all other counts were dismissed; that on May 26th an order was entered by the court setting date of June 1st, 1925, for judgment and sentence. On June 1st, on Burns' assent, it was continued one week. On June 8th an order was entered putting over sentence to September 1st, 1925; it does not appear at whose request. Judgment was put over until that time, and on September 1st the court entered an order putting judgment and sentence over one week; on September 8th continuance of sentence was denied, and bail forfeited nisi and bench warrant issued for Burns."

The government then rested. Motion was made by the defendant for a non-suit for the reason that the evidence does not justify making the judgment absolute, and shows affirmatively that the government is not entitled to judgment absolute (Tr. 17).

The court then stated that it had not been proved that the defendant had been called. Thereupon journal entry of September 8 was read, as follows: "Now on this 8th day of September, 1925, the above defendant is called for sentence and not responding is called

three times in the corridor of the court. Not responding, bail is forfeited nisi and bench warrant issued." The government then rested. Motion for non-suit was renewed, but denied. Defendant then offered in evidence the criminal complaint in the action, which was marked filed May 5, 1925 (Tr. 17). Defendant rested.

Argument followed (Tr. 18) and the court took the matter under advisement, and finally entered judgment for the plaintiff, making the forfeiture absolute, to which an exception was taken and allowed. (Tr. 18.)

Formal written judgment was thereafter entered and an exception taken (Tr. 8-11).

ASSIGNMENTS OF ERROR (Tr. 12)

Error was assigned as follows: (1) the court erred in refusing to grant the appellant's motion for non-suit; (2) the court erred in granting judgment for the plaintiff; (3) the court erred in refusing to grant judgment for the defendant dismissing the action.

The assignments of error raised practically a single question: Do the admitted facts justify the judgment?

ARGUMENT

NATURE OF SCIRE FACIAS

Scire facias on a bail bond is the commencement of a new and original civil action. The writ is the complaint. Defendant must answer and may set up any matter of defense. Plaintiff must prove all the material allegations of his complaint.

Hollister v. U. S., 145 Fed. 773, 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, 491;

U. S. v. Hall, 37 L. Ed. 332; 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;
24 *R.C.L.* 676, Sec. 17;

3 *R.C.L.,* 65, Sec. 80;

35 *Cyc.* 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

In *Kirk v. U. S.,* 124 Fed. 324, it is said, p. 336:

> "In scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance,

> and differs from any other suit to enforce it only in the process by which it is commenced."

The burden of proof is on the plaintiff, and it must prove all the essential allegations of the writ (complaint) by competent evidence. The record on which the writ is issued is not a part of the writ, but must be introduced in evidence to prove the case. When introduced it must support the allegations of the writ or the plaintiff fails. See cases cited above.

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues is not a part of the case, but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, the record upon which the writ issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held that on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.* 61 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court said:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ eminates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recitals, *it is incumbent on the plaintiff to verify the same by producing the records and files, and the facts in question cannot be otherwise proven* * * *."

THE PLAINTIFF FAILED TO PROVE THE ESSENTIAL ALLEGATIONS OF ITS WRIT (COMPLAINT)

I.

PLAINTIFF FAILED TO PROVE THAT THE SURETY WAS CALLED TO PRODUCE THE DEFENDANT.

The plaintiff offered proof indicating that the defendant was called; but failed to offer any evidence that the surety was called. The bond being a joint and several obligation, this was necessary. In 3 R.C.L., p. 62, Sec. 75, it is said:

"Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the surety as well as that of the principal, should be separately forfeited in the usual manner. The prisoner should be called to appear, and the bond should be called to bring forth the body of the prisoner whom he undertook to have there that day, or forfeit his recognizance.

II.

Plaintiff Failed to Prove the Judgment Nisi as Alleged

It is true that the plaintiff read in evidence a line from the clerk's docket (Tr. 17), to the effect that: "The bail is forfeited nisi and bench warrant issued." This is not sufficient, as it does not mention against whom the judgment was rendered—or the amount—nor does it have any of the requisites of a judgment sufficient to sustain a scire facias.

In pleading the judgment nisi it is necessary to state with great particularity the details concerning the alleged judgment. 24 R.C.L. p. 677, Sec. 18.

The judgment nisi must be proved.

Nelson v. State, 73 S. W. 398;
General Bonding Co. v. State, 165 S. W. 615;
Hunt v. U. S., 61 Fed. 795;
McWhorter v. State, 14 Tex. App. 239.

The particularity with which the judgment nisi must be proved is shown by the following cases, in which it is held that any variance between the judgment offered and the judgment alleged is fatal:

Farris v. People, 58 Ill. 26;
Eckert v. Phillip, 4 Pa. Co. Ct. 514;
Highsaw v. State, 19 S. W. 762;
Bolinger v. Bower, 14 Ark. 27;
Avant v. State, 26 S. W. 411;
Smith v. State (Miss.), 25 So. 491;
Dailey v. State, 22 S. W. 4;
Brown v. State, 11 S. W. 1022.

This judgment is not even definite as to which defendant was called. The information (Tr. 20) shows there were three defendants in cause No. 9548, and the judgment nisi should at least be certain that Larry Burns was the defendant called.

The writ (Tr. 2), alleges that the judgment was to pay $750 to the United States, but the proof offered does not support the allegations, nor does it show any amount.

III.

The Uncontradicted Record and Evidence Affirmatively Show that Burns Fully Complied with the Terms of His Bond, and that no Default was Made

The plaintiff's evidence shows (Tr. 16) that on May 26 Burns appeared and plead guilty to counts 1 and 2 of the information, and that the rest of the counts were dismissed. It was then shown (Tr. 16) that judgment and sentence on counts 1 and 2 were continued from time to time until September 8, at which time it is claimed Burns failed to appear for sentence, on counts 1 and 2, to which he had plead guilty.

Were these two charges covered by the bond?

On examining the bond (Tr. 19), it will be found that the condition was to answer an offense committed on or about *November* 21, 1924, thus (Tr. 19):

> "Then and there answer the charge of having, on or about the 21st day of November, A. D. 1924, within said district, in violation of Section ..... of the N. P. A. (Act of .....) (Criminal Code) (Revised Statutes) of the United States, unlawfully, knowingly and wilfully maintain a common nuisance and have, possess and sell certain intoxicating liquor."

Examining the information (Tr. 21) it will be found that Burns and two others were charged with seven separate and distinct charges, as follows: Count I (Tr. 21) on *October* 24th, 1924, the sale of intoxicating liquor; Count II (Tr. 22) on *October* 16, 1924, sale of intoxicating liquor; Count III (Tr. 23) on *October* 24, 1924, sale of intoxicating liquor; Count IV (Tr. 24) on *October* 31, 1924, possession with intent to sell; Count V (Tr. 25), prior conviction; Count VI (Tr. 25), on *November* 8, 1924, sale of intoxicating liquor; Count VII, (Tr. 26) from *October* 4 *to November* 8, 1924, maintaining a nuisance.

As stated, on May 26, 1925 (prior to the forfeiture), Burns appeared and plead guilty to counts 1 and 2, and the other counts were dismissed (Tr. 16). Thus the government dismissed all charges or offenses occurring after October 16, 1924, and these were several running into November. The bond was to answer an offense committed on *November* 21, 1924, and not any one of the many offenses occurring prior to that date.

Consequently, on September 8, 1925, *when the bond was forfeited, there was no charge covered by the bond pending against Burns.*

It might well be said that no charge covered by the bond was ever filed against Burns. Seven other separate and distinct charges were filed, but not one covered by the bond, as no charge is made for November 21.

IV.

In Any Event the Bond was Discharged Because the Charge Brought Against Burns was Different than the Charge Covered by the Bond

As shown above, the bond covers an offense committed on or about November 21. The charge filed was for seven different offenses. This is fatal.

> *Dillingham v. U. S.*, 7 Fed. Cas. No. 3913;
> 6 *C. J. p.* 1001-2; 1029.

In *Dillingham v. U. S., supra,* it was held that the bond was void where a different charge was brought from that stated in the bond.

In 6 *C. J.* p. 1001, it is said:

> "In the absence of a statute otherwise, where the offense stated in the bail bond or recognizance is different from that with which the accused stands charged, it will invalidate the undertaking, unless the variance is an immaterial one."

At p. 1002 it is said:

> "If the variance (between information and bond) is a substantial one, and the bond or recog-

nizance names or describes a different offense from that charged in the indictment, although it describes one of the same general class or nature, the sureties will not be bound."

This rule is reasonable because the contract is to produce the defendant to answer one charge, not another.

V.

The Bond was Discharged for Failure to Call the Defendant at any Proper Time

This bond was strictly a one term bond. It did not contain the "term to term" condition; it required the defendant to "appear on the ..... day on the November term to be begun and held * * * on the 9th day of February, 1925."

Burns was not called during the November, 1924, term, but only on September 8 (if at all). This was at a different term and not covered by the bond. The information itself was not filed during the November term.

A.—*This discharged the surety. A bond conditioned for appearance at a specified term, and which does not contain the term "term to term," does not bind the surety after the term specified.*

U. S. v. Mace, 281 Fed. 635 (8 CCA);

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Backland, 33 Fed. 156;

Reese v. U. S., 19 L. Ed. 541;

6 *C. J.* 1035, 1038;

3 *R.C.L.* p. 41, Sec. 47;

Arnstein v. U. S., 296 Fed. 946;

Joelson v. U. S., 281 Fed. 106 (3 CCA).

In 6 *C. J.* it is stated, at p. 1035:

"As a general rule, when the bond or recognizance specifies the term and place at which the accused is to appear, he is not bound to appear, and the bond or recognizance cannot be forfeited for his failure to appear at any other term or place. Thus in such a case he is not, as a general rule, bound to appear before any other court, or at any other place, or during any other term or day than that specified in the undertaking; and it has been held that if the time of holding the court is subsequently changed from the day set by it, a failure to appear on the day which it is changed does not operate as a forfeiture."

And, at page 1038, it is said:

"But where the obligation of the bond is not a continuing one (term to term), the bail are entitled to discharge at the term designated for appearance. Thus, it has been held that, where the condition is for appearance at the next term and from day to day, it applies only to that particular term of court, and that an adjournment

to a subsequent term is not within the contract of the recognizance, and operates to discharge it."

In 3 *R.C.I.*, p. 41, Sec. 47, it is stated:

"Ordinarily recognizances or bail bonds obligate the surety to procure the appearance of their principal at the time, and not at any subsequent term. Where recognizance in a criminal case is conditioned 'that the principal appear at the next term and thereafter from day to day and not depart without leave,' or contains the further condition that he 'shall abide the judgment of the court,' the surety is bound for the appearance of the prisoner during the first term of the court only, and if court adjourns without making any order, the sureties are exonerated from their recognizance."

B.—*The bail is discharged under the state laws.*

The conditions of a bail bond in the federal court are governed by the laws of the state in which the federal court is located.

Rev. Stat. Sec. 1014; *U. S. Comp. Stat. Sec.* 1674;

U. S. v. Ewing, 140 U. S. 142, 35 L. Ed. 388;

U. S. v. Patterson, 150 U. S. 67; 37 L. Ed. 997;

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Mace, 281 Fed. 635;

U. S. v. Sauer, 73 Fed. 671.

Under the rule just stated it has been held, in the cases cited, that the requisites of a bail bond in the federal court are governed by the laws of the state. If, under the state laws and decisions a certain act discharges the bail, that the same acts discharge the bail in the federal court.

It is necessary, then, to examine the state statute regarding bail:

Rem. Comp. Stat. Sec. 2311, provides:

> "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

And Rem. 2312:

> "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

In this case the information was not filed within thirty days after giving the bail, nor was the defendant called within sixty days after the filing of the information. On the contrary, many months elapsed.

Decisions of the state courts construing state statutes are binding rules of decisions for the federal court. Rev. Stat. Sec. 721; *Comp. Stat.* Sec. 1538.

The surety is discharged under Washington decisions.

State v. Lewis, 35 Wash. 261, 77 Pac. 198;

State v. Caruso, 137 Wash. 519, 529, 243 Pac. 14.

In *State v. Lewis, supra,* the Washington statutes requiring the filing of the information within thirty days and bringing the defendant to trial within sixty days, were held *mandatory.* In that case the bail was forfeited prior to the filing of the information, but the court held that, the statute being mandatory, the sureties were entitled to protection of the statute, and failure of the state to file the charge released the surety.

VI.

The Bond Produced was Conditioned Differently Than the Bond Sued on

As shown above, the bond produced in evidence was not a "term to term" bond. The writ (Tr. 2) alleges a "term to term" bond. This was a fatal variance.

VII.

Continuing a Case Indefinitely After a Plea of Guilty Discharges the Surety

Burns plead guilty on May 26. This put him in the custody of the law so that an indefinite continuance of his case to September 8 unjustly and unduly prolonged the risk of the surety, and the surety was thereby discharged.

SUMMARY

We respectfully submit that the judgment should be reversed with instructions to dismiss the action because:

(1) There was no proof whatsoever that the surety was called to produce the defendant;

(2) There was no proof of the judgment nisi;

(3) The uncontradicted evidence affirmatively shows that the defendant fully complied with the terms of the bond, and that no default was made;

a. The defendant appeared and plead guilty to two counts of the information;

b. That part of the seven charges brought against the defendant, which were possibly covered by the bond, were dismissed prior to the alleged forfeiture.

(4) In any event the bond was discharged because the seven charges brought against defendant were more and different than the charge covered by the bond;

(5) The bond was discharged (a) for failure to call the defendant at the term specified in the bond; (b) for failure to file a charge against the defendant during the term specified in the bond;

(6) The bond produced was materially different from the bond alleged:

a. The bond produced was a time to time bond only; and the bond alleged was a term to term bond.

(7) Continuing the case indefinitely after a plea of guilty discharged the surety.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.